COMMENTS

THE FELA AND TRIAL BY JURY

At twelve-ten a.m. on the morning of January 2, 1952 an eastbound train was crossing Bettes Corners in Akron, Ohio. Carl Inman, the watchman, was standing slightly west of the tracks his back toward Tallmadge Avenue traffic. Moments earlier he had halted vehicular traffic and now he was performing his duty of watching for "hotboxes" on the passing train. A drunken driver heading northeast on Home Avenue ran a stop sign, attempted to turn left onto Tallmadge and struck down Inman.

Inman brought suit against his employer, under the Federal Employers Liability Act,[1] alleging that the railroad had been negligent in failing to provide him with a safe place to work. The jury agreed. The court of appeals reversed ordering judgment for defendant[2] and the Ohio Supreme Court refused to consider the case.[3] The United States Supreme Court granted certiorari[4] and on December 14, 1959 affirmed the Ohio Court of Appeals.[5] Four justices dissented holding that a jury case had been presented.[6] Of fifty-two such FELA cases heard on the merits in the past seventeen years by the Court this was only the sixth in which a withdrawal of the cause from the jury had been upheld.[7]

A little over a month later the Court heard the case of *Davis v. Virginian Ry.*[8] In that case there was evidence tending to show that the plaintiff, a yard conductor, was ordered to perform in thirty minutes a "spotting" job normally requiring fifty minutes to over an hour, and to do so with the aid of two inexperienced brakemen. In running from one car to another, the plaintiff slipped from a ladder and was injured. The Virginia trial court took the cause from the jury and the states highest court affirmed. The United States Supreme Court, by a six-to-three vote, reversed, holding that a jury question had been raised. These cases have reopened the heated controversy

1 35 Stat. 65 (1908), 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1958).

2 Inman v. Baltimore & O.R.R., 108 Ohio App. 124, 161 N.E.2d 60 (1958).

3 168 Ohio St. 335, 154 N.E.2d 442 (1958).

4 359 U.S. 958 (1959).

5 361 U.S. 138 (1959).

6 Inman v. Baltimore & O.R.R., (Douglas, J. dissenting) 361 U.S. at 143 (1959).

7 See Harris v. Pennyslvania R.R. (appendix to concurring opinion of Douglas, J.) 361 U.S. 15 at 20 (1959) and Wilkerson v. McCarthy, (appendix to concurring opinion of Douglas, J.) 336 U.S. 53 at 71 (1949). See also Ferguson v. Moore-McCormack Lines, Inc., (appendix to dissenting opinion of Frankfurter, J.) 352 U.S. 521 at 548 (1957).

8 361 U.S. 354 (1960).

among lawyers connected with the railroad industry or with railroad employees or their organizations over the Court's decisions in the past twenty years defining a jury question under the FELA.

The criticisms leveled at the Court and with which this paper is concerned can be assimilated into three major categories: (1) The Court has taken an Act which bases recovery on negligence and converted it into one which provides liability without fault. (2) The Court has done violence to the common law of negligence, particularly in depriving the trial judge of his historic function of keeping the jury verdict within the bounds of reason. (3) The Court continues to hear FELA cases on certiorari in which it formulates no discernible legal standards but merely resolves the peculiar issue between the parties to the case.

We shall first consider each of these criticisms in more detail and then attempt to analyze their validity.

"Judicial Workmen's Compensation"

The FELA is based on negligence and in comparison with workmen's compensation acts (providing limited liability for *all* job-incurred injuries) it has been described as a "crude" and "unjust" scheme for compensating workmen.[9] Many advocate replacing the former with the latter.[10] This seems wise and inevitable in time. Perhaps the chief stumbling block today is the monetary amounts of the limited liability.[11] But many agree with Justice Roberts that the Court has taken it upon itself to so amend the FELA and to this they object.

> Finally, I cannot concur in the intimation, which I think the opinion gives, that, as Congress has seen fit not to enact a workmen's compensation law, this court will strain the law of negligence to accord compensation where the employer is without fault.[12]

Although the cry of judicial workmen's compensation has been

[9] Stone v. New York, C. & St. L.R.R., (dissenting opinion per Frankfurter, J.) 344 U.S. 407, 410 (1953).

[10] Miller, "The Quest for a Federal Workmen's Compensation Law for Railroad Employees" 18 Law & Contemp. Prob. 188 (1953); Parker, "FELA or Uniform Compensation for All Workers" 18 Law & Contemp. Prob. 208 (1953). See also Stone v. New York, C. & St. L.R.R., (dissenting opinion per Frankfurter, J.) *supra* note 9.

[11] Pollack, "The Crisis in Work-Injury Compensation On and Off the Railroads" 18 Law & Contemp. Prob 296 (1953). It has been suggested that such a change is strongly opposed by the railroad unions. Miller, *supra* note 10. But it has also been pointed out that at an earlier date when the Act was more strictly construed, the railroads were no less adamant in their opposition to replacing it with workmen's compensation. DeParcq, "A Decade of Progress Under the FELA" 18 Law & Contemp. Prob. 257 (1953).

[12] Bailey v. Central Vt. Ry., (dissenting opinion per Roberts, J.) 319 U.S. 350 at 354, 358 (1943). Mr. Justice Frankfurter echoes this sympathy in his dissenting opinion in Stone v. New York, C. & St. L.R.R., *supra* note 9 at 410.

taken up frequently by the Court's critics, in view of the *Inman*[13] case it appears to be at least an exaggeration.

The Court continues to assert that the basis for liability is negligence,[14] every trial court judge must so charge, and the recent Court has never upset a jury finding of no negligence.[15]

The fact that the bulk of these cases heard by the Supreme Court on the merits are decided for plaintiffs[16] is inconclusive when it is considered that the Court only grants certiorari where it appears that its standards have been misapplied, and that few lower courts have been prone to misapply them in favor of plaintiffs.[17]

Certiorari is denied in many cases where a verdict has been directed for the defendant on the basis that the plaintiff has failed to present a jury issue on negligence.[18] While it is true that denial of certiorari does not constitute an adjudication on the merits,[19] it is also true that the Supreme Court seldom denies certiorari where an inferior court has flagrantly disregarded its interpretation of the law.[20]

"Violence to the Common Law"

More precisely what the Court has done has been to expand the definition of a jury question.[21]

This decision that a jury verdict enjoys a preferred position under the FELA is also subjected to heated dispute. Mr. Justice Roberts dissenting in the *Bailey* case said:

> [T]he Seventh Amendment envisages trial not by jury, but by court and jury, according to the view of the common law and . . .

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13 Inman v. Baltimore & O.R.R., *supra* note 5.

14 "The Act does not make the employer an insurer." Inman v. Baltimore & O.R.R., 361 U.S. at 140 (1959). "We conclude that the issue of *negligence* . . . should have been submitted to the jury. . . ." Davis v. Virginian Ry., 361 U.S. at 355 (1960). "In this situation the employer's liability is to be determined under the general rule which defines negligence. . . ." Tiller v. Atlantic Coast Line Ry., 318 U.S. 54 (1943). Wilkerson v. McCarthy, 336 U.S. 53, 62 (1949).

15 See appendices cited *supra* note 7.

16 *Supra* note 7.

17 *See, e.g.*, Griswold v. Gardner, (separate opinion of Major, J.) 155 F.2d 333, 334 (1946).

18 *Supra* note 7.

19 See Alderman, "What the New Supreme Court Has Done to the Old Law of Negligence" 18 Law & Contemp. Prob. 110, 147 (1953).

20 *E.g.*, Blackburn v. Alabama, 361 U.S. 199 (1960) dealing with coerced confessions. The Court developed no new rules of law but strongly implied that the state court had ignored United States Supreme Court precedents.

21 "This assumption, that railroads are made insurers where the issue of negligence is left to the jury, is inadmissable. It rests on another assumption, this one unarticulated, that juries will invariably decide negligence questions against railroads." Wilkerson v. McCarthy, 336 U.S. 53, 62 (1949).

> federal and state courts have not usurped power denied them by the fundamental law in directing verdicts where a party failed to adduce proof to support his contention, or in entering judgment notwithstanding a verdict for like reasons.[22]

The positions taken by the opposing camps can be thus summarized: The critics speak of the Court's having done violence to the common law of negligence,[23] while the Court has characterized the FELA as "an avowed departure from the rules of the common law."[24]

"Ad Hoc Determinations"

Another complaint is raised by Justices Frankfurter and Harlan. They maintain that these cases are not properly within the certiorari function of the Court.[25] They base this premise on the conclusion that reasonable judges of good conscience can differ as to what constitutes a jury issue and that consequently this decision should be left to the discretion of the lower courts.[26] They assert that the Court has not been fashioning any discernible standards of precedential value in these cases[27] but has rather been attempting to "do justice" in individual cases;[28] a task traditionally outside the scope of the certiorari jurisdiction.[29]

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22 Bailey v. Central Vt. Ry., (dissenting opinion per Roberts, J.) 319 U.S. 350 at 354, 358 (1943).

23 Bailey v. Central Vt. Ry., (dissenting opinion per Roberts, J.) *supra* note 22 at 358 (1943); *see also* Stone v. New York, C. & St. L.R.R., (dissenting opinion per Frankfurter, J.) 344 U.S. 407, 410-11 (1953); Wright, "The Employer's Liability Act: Does the Supreme Court Want It Repealed," 45 A.B.A.J. 151 (1959) (This article also takes the position that the Court has made the railroads "insurers"); Alderman, "What the New Supreme Court Has Done to the Old Law of Neglignce" 18 Law & Contemp. Prob. 110 (1953).

24 Sinkler v. Missouri Pac. R.R., 356 U.S. 326, 329 (1958).

25 Ferguson v. Moore-McCormack Lines, (dissenting opinion per Frankfurter, J.) 352 U.S. 521, 524 (1957) (This dissent also applied to Rogers v. Missouri Pac. R.R., 352 U.S. 500 (1957), Webb v. Illinois C.R.R., 352 U.S. 512 (1957) and Herdman v. Pennsylvania R.R., 352 U.S. 518 (1957). Justice Frankfurter refers to it as his dissent in *Rogers*.) Ferguson v. Moore-McCormack Lines, (dissenting opinion per Harlan, J.) 352 U.S. at 559 (1957). *See also* Harris v. Pennsylvania R.R., (dissenting opinion per Harlan, J.) 361 U.S. 15 at 25 (1959).

26 Stone v. New York, C. & St. L.R.R., (dissenting opinion per Frankfurter, J.) *supra* note 9 at 411 (1953). *See* Gibson v. Thompson, (concurring opinion of Harlan, J.) 355 U.S. 18, 19 (1957).

27 Harris v. Pennsylvania R.R., (dissenting opinion per Harlan, J.) 361 U.S. at 25, 27-8 (1959).

28 Ferguson v. Moore-McCormack Lines Inc., (dissenting opinion per Frankfurter, J.) 352 U.S. at 525 (1957).

29 *Ibid.* Justice Frankfurter takes the position that the "historic right" of a Justice to dissent frees him of any obligation to consider these cases on the merits. *Ibid* at 528. He therefore dissents in most of these cases on the ground that the writ of certiorari should be dismissed as "improvidently granted." *Ibid* at 526. See e.g. Davis v.

The Questions

The substantial questions posed by these cases then are: (1) Has the Court formulated any discernible standards for measuring a jury case in this area and if so, (2) are these standards a valid interpretation of the Act.

THE HISTORY

At the turn of the century while railroading was the most hazardous of our nation's major occupations,[30] the common law, through the doctrines of fellow servant,[31] assumption of risk[32] and contributory negligence,[33] had effectively insulated employers against negligence suits by their employees. Out of this background came the FELA.[34]

Recovery under the FELA is based on negligence[35] but the fellow-servant doctrine is abolished[36] and the effect of contributory negligence is reduced to that of comparative negligence.[37] As originally passed,

Virginian Ry., *supra* note 8. Cf. Inman v. Baltimore & O.R.R., *supra* note 5. Justice Harlan while agreeing with Justice Frankfurter that certiorari should not be granted in these cases, feels that the "rule of four" (certiorari is granted on the vote of four concurring Justices) compels him to consider these cases on the merits when it has been granted. Ferguson v. Moore-McCormack Lines, Inc., (dissenting opinion per Harlan, J.) 352 U.S. at 559 (1957) *See also* Davis v. Virginian Ry., *supra;* Inman v. Baltimore & O.R.R., *supra;* Gibson v. Thompson, *supra* note 26.

30 3rd Annual Rep. I.C.C. 84-95 (1889).

31 Priestly v. Fowler 3 M. & W. 1, 7 L.J. Ex. 42 (1837); Prosser, Torts § 68 (2d ed. 1955).

32 *Ibid.*

33 Butterfield v. Forrester, 11 East. 60, 103 Eng. Rep. 926 (1809); Prosser, Torts § 68 (2d ed. 1955).

34 The first FELA was enacted July 11, 1906, 34 Stat. 232 (1906). It was declared unconstitutional in The Employer's Liability Cases, 207 U.S. 463 (1908) as extending to employees outside the scope of Congressional power under the commerce clause. It was re-enacted with that defect cured on April 22, 1908, 35 Stat. 65 (1908), 45 U.S.C. § 51 (1958) and its constitutionality was upheld in the Second Employer's Liability Cases, 223 U.S. 1 (1912). In 1910 it was amended to expressly provide concurrent jurisdiction of state courts and a right of survival. 36 Stat. 291 (1910), 45 U.S.C. § 56, 59 (1958). In 1939 the scope of the Act was expanded to take advantage of the modern interpretation of the commerce clause. 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1958).

35 "Every common carrier by railroad while engaging in commerce . . . [interstate] . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of . . . [certain relatives] for such injury or death *resulting in whole or in part from the negligence of* any of the *officers, agents, or employees* of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment." (emphasis supplied) 35 Stat. 65 (1908), 53 Stat. 1404 (1939), 45 U.S.C. 51 (1958).

36 *Ibid.*

37 ". . . [T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in

the Act eliminated assumption of risk only where the negligence was a breach of a federal railway safety statute.[38] In 1938 after that doctrine had been used rather freely for thirty years it was finally laid to rest by Congress.[39]

TRIAL BY JURY

With the employees' road to recovery finally cleared of the common-law pitfalls, the Court turned its attention to the last method by which judges could control or frustrate (according to one's predelection) the jury's determination that the employee deserved to be compensated; that is, the directed verdict or judgment notwithstanding the verdict.

The FELA does not expressly require a trial by jury but the Act seems to contemplate one.[40] Early cases held that state courts were not required to furnish a jury trial in FELA actions where state procedure did not so dictate.[41]

But in *Bailey v. Central Vt. R.R.* the Court stated that trial by jury "is part and parcel of the remedy afforded railroad workers under the [FELA],"[42] basing that determination in part on the seventh amendment.[43]

That same year the Court had stated how such a right should be enforced:

> Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states.[44]

In 1946 in *Lavender v. Kurn* the Court gave an indication of what the rule included:

> [A] measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference.[45]

Finally in 1956 in *Rogers v. Missouri Pac. R.R.* the "rule of reason" was adopted:

Under this statute the test of a jury case is simply whether the

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proportion to the amount of negligence attributable to such employee. . . ." 35 Stat. 66 (1908), 45 U.S.C. § 53 (1958).

38 35 Stat. 65 (1908).

39 53 Stat. 1404 (1939), 45 U.S.C. § 54 (1958); Tiller v. Atlantic Coast Line Ry., 318 U.S. 54 (1943).

40 *Supra* note 37. Note the words ". . . shall be diminshed *by the jury* . . ."

41 Minneapolis & St. L.R.R. v. Bombolis, 241 U.S. 211 (1916).

42 319 U.S. 350, 354 (1943).

43 *Ibid.* "The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence.'"

44 Brady v. Southern Ry., 320 U.S. 476, 479 (1943).

45 327 U.S. 645, 653 (1946). *See also* Ellis v. Union Pac. R.R., 329 U.S. 649 (1947).

> proofs justify *with reason* the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought [emphasis added].[46]

To rephrase the purpose of this paper then in light of the facts of the controversy, the two questions presented are: (1) Is the "rule of reason" really a rule? (2) Is it a valid rule?

The Elements of a FELA Action

Roughly speaking, to determine liability under the FELA, and in common-law negligence actions, four issues must be decided by the trier of fact: (1) What are the facts of the case? (2) Did these facts constitute negligence on the defendant's part? (3) Did the conduct complained of in fact cause the injury? (4) Was the negligence the "proximate" or "legal" cause of the injury?[47] At common law, where "reasonable minds" can differ these are all questions for the jury.[48]

In a general verdict, and often in a special verdict, these elements are indistinguishable in the jury's decision. For this reason, courts are prone to lump the four together when speaking of what constitutes a jury question. More clarity is obtained if they are discussed separately.

Negligence

Courts are prone to speak of the plaintiff as having "the burden of proving negligence." This means that the plaintiff has the burden of proving the facts from which he asks the jury to find negligence. Negligence is the failure to meet a particular standard of care.[49] No one has the burden of proving the particular standard of care. The general standard of care is determined by the court[50] and in most of these cases is, of course, that care which a reasonable prudent man would exercise.[51] The particular standard of care is determined by the jury and is what the jury believes the reasonable prudent man would have done in the circumstances it finds to have existed in the particular case.[52] In so doing it should balance the utility of the ac-

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46 352 U.S. 500, 506 (1957).

47 Prosser, Torts § 39, 50 (2d ed. 1955).

48 *Ibid.*

49 *Ibid.* at 30.

50 *Ibid.* at 39.

51 "In this situation the employer's liability is to be determined under the general rule which defines negligence as the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation. . . ." Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 67 (1943); Prosser, Torts §§ 31, 39 (2d ed. 1955).

52 "But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and pru-

tor's conduct against the probability and probable severity of the harm which might result with due consideration toward alternative methods of accomplishing the same useful purpose and the feasibility of safeguards against the harm.[53] Evidence as to these and other factors may be relevant and will then be admitted. However, none need be and in the absence of such evidence the jury can, in fact must, determine the specific standard from its own knowledge.[54] Since no evidence need be produced on this matter, it is impossible to say either party has the burden of proving the specific standard of care.

In many of the FELA cases which the Court has decided there was little question as to what actually happened. The controversy was over whether or not defendant's conduct could be called negligent. The confusion results because the Act has put negligence into certain situations which are without precedent or analogy.

Take for example the *Bailey* case.[55] There plaintiff's decedent was ordered to use a large wrench to open the hopper door of a car sitting on a bridge. The wrench spun and knocked him from his narrow footing causing him to fall to his death. There was evidence of safer alternatives. The key word is "ordered." The common law of negligence knew nothing of a man's being "ordered" to do something. If a man went onto the bridge voluntarily (even under the economic compulsion of keeping his job) he assumed the risk and there was no liability.[56] If he was physically compelled to go on the bridge the action would be in intentional tort, not negligence. So the reasonable prudent man has been required to enter a field with which he is not familiar. It is understandable that disagreement should arise as to what his conduct would be.

Note that this element is involved in both the *Inman* and *Davis* cases, as well as *Rogers* which developed the rule of reason.

It seems clear today under the FELA that when an employer orders an employee to do a negligent act or to perform a task which would require negligent conduct to accomplish, the employer may be held negligent for so ordering and the employee not contributorily negligent for carrying out the order.[57]

The cases of *Harris v. Pennsylvania R.R.*[58] and *Stone v. New*

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dent person would have done under the same circumstances." Wilkerson v. McCarthy, 336 U.S. 53, 61 (1949); Prosser, Torts § 39 (2d ed. 1955).

[53] Prosser, Torts § 30 at 122 (2d ed. 1955).

[54] *Ibid.* § 32.

[55] Bailey v. Central Vt. Ry., *supra* note 12.

[56] Thrussell v. Handyside & Co., 20 Q.B.D. 359 (1888); Woodley v. Metropolitan Dist. Ry., 2 Ex. Div. 384 (1887).

[57] Davis v. Virginian Ry., *supra* note 8; Bailey v. Central Vt. Ry., *supra* note 12.

[58] 361 U.S. 15 (1959).

York, C. & St. L. Ry.[59] illustrate the logical extension of this rule into an area even more remote to the common law. Harris was ordered to pick up a large wooden block and Stone was removing a railroad tie. After unsuccessful attempts both men complained that the job was too difficult and both were ordered to continue. Both men injured their backs.

It is difficult to picture a situation in which a recovery could be had at common law for straining oneself. But the foreseeability was there and once we accept the notion that an employer can be liable for a negligent order and an employee not negligent in carrying it out, the result follows.[60]

The common law obliged an employer to use reasonable care to furnish an employee with a safe place to work.[61] He was considered a business visitor and as such could recover from the employer for negligently created or permitted conditions of the premises which caused his injury, but only if in the exercise of due care he could not have detected or avoided such conditions.[62] But where the effect of contributory negligence is reduced to that of comparative negligence in carrying out a negligent order and assumption of risk abolished, we have seen in the *Bailey* case that this last limitation is somewhat diminished.

The Court has diminished this restriction even further. In *Wilkerson v. McCarthy*[63] the plaintiff was injured when he fell from a dangerous walkway across a wheel pit. The company had erected chains presumably to prevent such use but there was evidence tending to show that these chains were circumvented with such frequency that the employer knew or should have known of it. Although the employee may have been negligent, the Court emphasized the fact that the employer is liable for injuries resulting "in whole or *in part*" from its negligence and stated that the jury was at liberty to find that the reasonable prudent railroad would have done more to protect its employees against their own negligent conduct.

This theory was carried out of the area of safe place to work in *Ringhiser v. Chesapeake & O. R.R.*[64] where the plaintiff was injured when the gondola car he was using for a toilet was bumped. The

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59 344 U.S. 407 (1953).

60 *See also* Blair v. Baltimore & O.R.R., 323 U.S. 600 (1945).

61 Choctaw, Okla., & G.R.R. v. McDade, 191 U.S. 64 (1903); Patton v. Texas & Pac. Ry., 179 U.S. 658 (1901); Union Pac. Ry. v. O'Brien, 161 U.S. 451 (1896).

62 Ragon v. Toledo, A.A. & N.M. Ry., 97 Mich. 265, 56 N.W. 612 (1893); Prosser, Torts § 67 (2d ed. 1955).

63 *Supra* note 52. See also Funkhouser, "What is a Safe Place to Work Under the FELA," 17 Ohio St. L.J. 367 (1956).

64 354 U.S. 901 (1957).

Supreme Court felt that there was evidence from which the jury could find that the railroad was aware of this dangerous practice and presumably that they should have taken measures to stop it.

PROXIMATE CAUSE

Few true proximate-cause cases have arisen under the Act and none of them, outside the area of violation of safety statutes, has significantly demonstrated that the Court will deviate from common law concepts.

Causation in Fact

Proximate cause or "legal" cause, as it is sometimes called, is made up of both factual and policy considerations. Causation in fact is often stated in terms of a requirement that it must appear that "but for" the defendant's conduct the injury would not have occurred.[65] But causation is a fact which must always be inferred, for notions of cause and effect are but projections of human experience onto a sequence of events.[66]

When a person gets into an automobile, drives down the street and runs over another, it is not difficult for us to say that the victim has received certain injuries which he would not have received but for the driver's conduct, that is, the conduct of driving the car. But it must also appear they would not have occurred but for the defendant's *negligent* conduct. Suppose the jury finds that to drive over sixty miles per hour is negligent and that defendant was driving seventy. If the jury must find that the injury would not have occurred but for the fact that he was driving seventy, the causal inference is more difficult. The projection of human experience is not so precise in determining this type of question. The best it can do is tell us that it is more likely that the injury would occur at the greater speed.

Make the negligent "conduct" an omission or add a subjective human factor and there is still less certainty. Suppose the alleged negligence is not having lights on the automobile at dusk. Now we must say that the defendant would not have hit the victim if he had lights, or that he would not have hit him but for the fact that he did not. Even the victim cannot say definitely that he would have seen the car if it had had lights or that he would have been able to get out of the way if he had.

But common sense tells us that some conduct of this type creates unreasonable risks of harm and is hence negligent. Therefore the jury must be allowed to infer causation within the bounds of reason.

As a general rule, if in ordinary experience a certain kind of con-

[65] Prosser, Torts § 44 (2d ed. 1955).

[66] 5 Encyclopedia Britannica 62-65 (1958).

duct could be expected to produce a certain result and such result does in fact follow the conduct, the jury will be permitted to infer that the conduct caused the result.[67] This rule justifies the result in *Tenant v. Peoria & P. U. Ry.*[68] and the first decision in *Tiller v. Atlantic Coast Line R.R.*[69] Both cases involve employees run down by trains backing at night. In the first case the train started without ringing its bell, in the second the train had no light on the end toward which it was backing.

The Court did not speak of this rule but talked rather of the jury's liberty to draw reasonable inferences and a presumption that the employee was performing his duties and exercising due care for his own safety.

Policy Aspects

The policy aspects of proximate cause are most often couched in terms of foreseeability. At common law, liability for negligent conduct is limited to that kind of injury, the risk whereof made the conduct negligent. The reason usually given is that if one is to be made to compensate injury merely for creating an unreasonable risk, his liability should be limited to cases in which that risk is fulfilled rather than extended to injuries which incidently follow it in a sequence of causation.[70] Where this "proximate" aspect of causation is met, the jury will often be permitted to infer causation in fact.

This aspect of proximate cause prevented plaintiff's recovery in *Brady v. Southern Ry.*[71] in 1943. There plaintiff's decedent was killed when the car on which he was riding hit a derailer from the back side and left the track because the rail opposite the device was defective. The majority felt that the evidence established that hitting a derailer from the back side was so unusual as to be unforeseeable. Mr. Justice Black, speaking for the dissent, said that causation means simply "an event which contributes to produce a result."[72]

Although Justice Black is more often in the majority today and though this statement would seem to repudiate the "proximate" aspect of causation it should be read in light of the evidence in that case which to the average reader might open to question the majority's determination that hitting a derailer from the back side was "unforeseeable."[73]

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[67] Prosser, Torts § 44 at 223 (2d ed. 1955).

[68] 321 U.S. 29 (1944).

[69] *Supra* note 51.

[70] Prosser, Torts § 70 (2d ed. 1955).

[71] *Supra,* note 44.

[72] 320 U.S. at 488-89.

[73] The majority based this finding on the testimony of a railroad superintendent of 22 years experience who said "it happens very frequently. . . . I have seen it 25 to

Mr. Justice Harlan's dissent in *Davis* raises the question of proximate cause. He takes the view that the employer's negligence (in giving the order for the rush job with inexperienced help) "caused" the injury only in that it required the plaintiff to take a position on the cars rather than his normal position on the ground. This presumably created no unreasonable risk since other employees took these positions as a matter of routine. Justice Harlan noted particularly that the plaintiff could not say that he fell *because* he was rushed.[74] But could he ever so state any more than the man in the hypothetical case previously mentioned could say that he would not have been hit by the car had the driver had lights, and is the inference much more difficult here than there?

PROOF OF THE FACTS

The Court has adopted the rule that in determining whether or not to submit the cause to the jury the courts must consider only the evidence most favorable to the party against whom the preemptive instructions are requested, i.e. the plaintiff.

This rule is based upon the prerogative of the jury to believe or disbelieve evidence. Therefore, if at the close of the plaintiff's evidence he has established a *prima facie* case, the jury in theory could disbelieve all of the defendant's evidence and reasonably find for plaintiff.

> But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.[75]

In a common-law negligence action, the burden of proof as to facts constituting negligence is on the plaintiff.[76] This has been defined as the burden of taking the juror's mind out of equilibrium and convincing him that it is more probable that what the plaintiff asserts is true than the converse.[77] The question is for the jury where "reasonable minds" might differ.[78] So the judge's function is merely to determine whether any reasonable mind could be convinced that it is more probable that what the plaintiff asserts is true than the converse.

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50 times." The Court apparently assumed that he had witnessed every such event that occurred during his 22 years' experience (on the tracks and in the office) and that twice a year was too infrequent to be deemed foreseeable. 320 U.S. at 483.

74 361 U.S. at 358.

75 Lavender v. Kurn, 327 U.S. 645, 653 (1946). See also Hill, "Substance and Procedure in State FELA Actions—The Converse of the Erie Problem," 17 Ohio St. L.J. 384, 393 (1956).

76 Prosser, Torts § 41 (2d ed. 1955).

77 Morgan, Some Problems of Proof Under the Anglo-American System of Litigation (1956).

78 *Op. cit. supra* note 48.

Despite what is often said about the Supreme Court shifting the burden of proof,[79] there is nothing in any of these opinions that would require the trial judge to alter the common law charge on burden of proof in a FELA action. These opinions go strictly to the standard which the *judge* applies in determining whether the issue should go to the jury.

The reasonable mind which the judge employs as a standard in a common law case has been referred to as "learned reason."[80] It is said to be more narrow than the layman's concept of reason and to include such factors as control of the jury's propensity to be free with others' money and perhaps the judge's socio-economic predelictions.[81]

The *Rogers* "rule of reason" has attempted to remove these factors from the concept of "learned reason" and to leave something closer to laymen's "reason."

A case which illustrates both of these propositions, is *Lavender v. Kurn*[82] from which the preceding quotation was taken. Their plaintiff's decedent, a switchman who had opened a switch to allow a train to back into the station, was found along side the tracks, dead of a skull fracture. The plaintiff's evidence tended to demonstrate the plausibility of the decedent's having been hit by a mail hook. The only direct proof was a statement of an unknown brakeman at the scene (repeated on the stand by a defense witness) that the plaintiff had been so killed, which statement was admitted as part of the *res gestae*. The railroad introduced testimony tending to disprove this and to show the plausibility of (but not conclusively demonstrate) murder. No other possible causes were advanced nor do any spring to the mind. The Supreme Court held the case for the jury. Learned reason might say that the proofs were in equilibrium, and that therefore the party with the burden must lose in the "reasonable mind." But in view of the absence of other plausable causes, would the layman consider that man unreasonable who, on the one hand considered the fact that non-intentional violent death is more common than murder or, on the other hand, disbelieved the railroad's evidence, and then found it more probable than not that the decedent was struck by the mail hook?

THE "CLEARER" RULES

It appears that in these cases the Court has formulated at least three minor rules that are discernible. For negligence in the uncharted area of master and servant it has demonstrated two situations from

79 *E.g.*, Wright, *op. cit. supra* note 10.

80 Allen, "Learned and Unlearned Reason" 36 Jurid. Rev. 254 (1924).

81 Bohlen, "Mixed Questions of Law and Fact," 72 U. Pa. L. Rev. 111, 118-9 (1924).

82 *Supra* note 75.

which a jury might find negligence. (1) A master can be negligent in giving an order to an employee to act negligently or to perform a task which would reasonably require negligence to perform and the servant may not be negligent in carrying out such an order.[83] (2) A railroad may be required to use due care to prevent its employees from engaging in a dangerous course of conduct, once it is aware or should be aware of such a course of conduct.[84]

In the area of evidence, the Court has adopted the rule that in passing on a motion for directed verdict or judgment *n.o.v.* the trial court must look only to the evidence most favorable to the party against whom the motion is directed, basing this rule on the prerogative of the jury to disbelieve evidence.[85]

As to proximate cause, it does not appear that the Court has adopted any rules for the FELA significantly different from the common law rule in negligence cases.[86]

THE "RULE OF REASON"

The *Rogers* "Rule of Reason" pervades all three of the elements of an FELA action previously discussed.[87] In its semantic formulation it does not vary much from the "reasonable minds" test of the common law. But looking at the cases to which it has been applied one sees that it is closer to the "rational basis in the record" test[88] which is applied in reviewing some administrative decisions or the "scintilla"[89] rule formerly applied in some jurisdictions. More broadly, the rule seems to say that courts can no longer apply a "learned" reason with all its underlying policy connotations but that the sole test of a jury question is whether a man who would find for the plaintiff from the evidence would be considered "unreasonable" in the ordinary sense of the word. Yet this is not without limits, for the very imaginative might find almost any projection of circumstantial proof "reasonable."

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83 *Supra* p. 429.

84 *Supra* p. 430.

85 *Supra* pp. 433-4.

86 *Supra* pp. 431-2.

87 Justice Harlan has said that the rule of reason as announced in *Rogers* applied only to "causation" and was extended to negligence in later cases. Sinkler v. Missouri Pac. R.R., (dissenting opinion per Harlan, J.) 356 U.S. 326, 332 note 1 and accompanying text. It is submitted that the Missouri Supreme Court (which *Rogers* reversed) merely used the "proximate cause" idiom to express its view that in the "negligent order" case, it is the employee who is negligent rather than the employer. 284 S.W.2d 467 (1955).

88 "But such evidence [evidence supporting defendant's theory] has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney." Lavender v. Kurn, 327 U.S. 645, 652 (1946).

89 *See* Inman v. Baltimore & O.R.R., (concurring opinion per Whittaker, J.) 361 U.S. 138, 141 (1959).

Is It Enforceable?

It should be clear that when we deal with concepts such as reasonable minds differing and minds being in and out of equilibrium we are in a rather nebulous region. But the Court's approach to this seems to be that merely because a line must necessarily be hazy is no reason why its location cannot be changed. Justice Douglas has spoken of the Court's "stewardship" of these cases.[90] Perhaps what he means is that an indefinite rule can be changed only by creating a new atmosphere rather than by any lucid statements in an opinion.

One need only glance through the state and lower federal court advance sheets to see that causes are being sent to the jury that would never be in common law negligence actions.[91] The *Inman* case and the number of directed-verdict cases in which certiorari is denied illustrate that there is also a bottom to this rule and that every cause need not be sent to the jury, much less every injury be compensated.[92]

But it is frequently complained that lower courts have no way of predicting on which side of the "rule of reason," the Supreme Court will think a particular case falls.[93] The common law "reasonable minds" test is not noted for its predictability. The "rule of reason" may be no more predictable but neither is it much less. In the realm of negligence it is clear that the railroad may be held to a strict standard of careful conduct. If the ordinary man could in any way point an accusing finger at the employer in respect to the injury he may be held to compensate it.

It is interesting to note that in three of the six cases which have upheld withdrawal of the cause from the jury the allegedly negligent conduct promoted the safety of third parties. In *Inman,* the plaintiff was stationed in an allegedly "unsafe place to work" to flag motorists at the approach of a train. In *Herdman v. Pennsylvania R.R.*[94] plaintiff conductor was injured when emergency brakes were applied for the purpose (by his own admission) of avoiding a collision with an automobile on the tracks.

Proof of Fact

In drawing inferences from circumstantial facts the jury will be bound only by ordinary reason. In *Moore v. Chesapeake & O. R.R*[95]. the jury was not allowed to infer that emergency brakes were

[90] Harris v. Pennsylvania R.R., (concurring opinion per Douglas, J.) 361 U.S. 15 at 16 (1959).

[91] *See, e.g.,* New York, N.H. & H.R.R. v. Henagan, 272 F.2d 153 (1959). Note the interesting "proximate cause" question presented.

[92] *Supra* note 7.

[93] Hart, "The Supreme Court, 1958 Term" 73 Harv. L. Rev. 84 at 96-98 (1959).

[94] 352 U.S. 518 (1957).

[95] 340 U.S. 573 (1951).

applied unreasonably from the mere fact that they were applied. Note the contravailing safety aspect. In *Inman* a statement by a witness, not elaborated upon, describing the drunken driver who hit plaintiff as, "like a lot of them I seen there, jumping the gun,"[96] was not allowed to be the basis of a jury finding that reckless driving was so prevalent at the crossing that defendant had constructive notice of it.

Is It Sound?

The correct interpretation of a statute is something far removed from mathematical proof, since no one is possessed with absolute knowledge of the mythical "legislative intent."[97]

The Court has looked to the Acts reference to the jury, the Seventh Amendment, the words "injury resulting *in whole or in part* [from defendant's negligence]," and the abolition of the harsh common-law defenses (almost invariably applied by the court as a matter of law rather than by the jury) and decided that Congress intended that the plaintiff should have his case tried to the jury.

The Court apparently feels that judges through too free a use of the directed verdict and judgment *n.o.v.* often infringe this right to jury trial. In common law actions the Supreme Court is bound by deep-rooted precedent to approve this conduct but apparently it feels no such compulsion in statutory actions.

One cannot but take notice of the poor financial position today of many railroads. Many have suggested replacing the FELA with a workmen's compensation act. This would no doubt be fairer to the railroads and to injured workmen as a whole. But the Court's critics have been the loudest to agree that the Court itself cannot make this change (particularly without limited liability).

When railroads were financial giants and the FELA was passed, only an alarmist could have suspected that the Act might bankrupt railroads and when the directed verdict and assumption of risk were in full bloom the railroads vigorously opposed a shift to workmen's compensation.[98]

When the FELA was enacted the Congress obviously intended to liberalize recovery for railroad workers negligently injured, and despite the economic effect on an already sagging industry it appears that until Congress speaks again it will remain liberalized.

Stanley K. Laughlin, Jr.

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[96] 361 U.S. at 140.

[97] *See* Hart, *op. cit. supra* note 93 and the reply by Arnold, "Professor Hart's Theology," 73 Harv. L. Rev. 1298 (1960).

[98] *Supra* note 11.